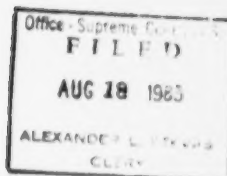


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ORIGINAL



NO. 82-6950
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

COMMONWEALTH OF PENNSYLVANIA,
Appellee

VS.

ROBERT SANTIAGO,
Appellant

ON APPEAL FROM THE SUPREME COURT
OF PENNSYLVANIA (NO.80-3-653)

ANSWER TO MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	<u>Page</u>
ANSWER TO MOTION TO DISMISS OR AFFIRM	1
COUNTER-STATEMENT OF THE QUESTION PRESENTED	1
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT	3
CONCLUSION	6

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Supreme Court cases</u>	
In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	5
Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969)	3
Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 2d 288(1952)	4
Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975)	5
Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)	3, 5
Ulster County Court v. Allen, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979)	2, 5
United States v. United States Gypsum, 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854(1978)	4

Pennsylvania Cases

Commonwealth ex rel Smith v. Myers, 438 Pa. 218 (1970)	4
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ANSWER TO MOTION TO DISMISS OR AFFIRM

Appellant, Robert Santiago, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves this Honorable Court to deny the motion of the Commonwealth of Pennsylvania to Dismiss or Affirm because the question presented is so substantial as to warrant further argument.

COUNTER STATEMENT OF THE
QUESTION PRESENTED

Should this Honorable Court dismiss the appeal or affirm an order of the Supreme Court of Pennsylvania which had affirmed appellant's conviction wherein appellant had argued that the statutory felony-murder rule of Pennsylvania is unconstitutional because it creates a mandatory and conclusive presumption of the essential element of malice and thus violates due process of law, conflicts with the presumption of innocence and dilutes the Commonwealth's burden of proof beyond a reasonable doubt?

COUNTER STATEMENT OF THE CASE

Appellant does not disagree with the factual and procedural history of the case which has been set forth by the Commonwealth of Pennsylvania. However, appellant does submit that such history is irrelevant because appellant is attacking the Pennsylvania felony-murder statute on its face and because where a case involves an unconstitutional mandatory or conclusive presumption it is irrelevant that there may otherwise be sufficient proof on the record to sustain the conviction. Thus even if, as the Commonwealth argues, the facts would otherwise be sufficient to establish the essential element of "malice", the conviction is none the less invalid because the Pennsylvania felony-murder statute (reproduced in the Appendix of the Commonwealth's Motion to Dismiss or Affirm) is unconstitutional on its face because the essential element of malice is conclusively presumed merely from proof that a death resulted during the perpetration of a felony, without any independent evaluation of whether the facts of the case otherwise demonstrate "malice." See: Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed. 2d 777 (1979).

ARGUMENT

The State of Pennsylvania misperceives the constitutional infirmity of the Pennsylvania second degree murder statute (felony-murder) and basis for appellant's argument in this Honorable Court. Appellant does not attack the constitutionality of the felony murder rule itself. It may be constitutional to presume malice from the commission of a dangerous felony, as long as the presumption is not conclusive or mandatory. That is not the issue in this appeal. The State is confusing the law of Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532 (1969) (a presumption is constitutional if it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend) with the law announced in such cases as Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979) (which invalidates presumptions which, although they may satisfy the requirements of Leary, are conclusive or have the effect of shifting the burden of proof as to an essential element of the offense). Thus, appellant is not arguing, as the State suggests that "Sandstrom v. Montana...invalidated the felony-murder rule." What appellant is arguing is that the Pennsylvania second degree murder statute is unconstitutional because it creates a conclusive presumption of malice merely because a death resulted during the perpetration of a felony.

The State admits, as it must, that "malice" is an essential element of the three degrees of murder which are defined by statute in Pennsylvania, including second degree murder (felony-murder). The statute is unconstitutional because all the state need show is that a death resulted during a named felony. Once that showing is made, malice is conclusively presumed. It cannot even be rebutted.

The Pennsylvania statute conclusively imputes malice even if it may not exist expressly and even if the killing is accidental. Commonwealth ex rel Smith v. Myers, 438 Pa. 218, 224-225 (1970).

The conclusive presumption of malice which testimony cannot overthrow effectively eliminates malice as an ingredient of the offense. That is unconstitutional. Morissette v. United States, 342 U.S. 246, 274-275, 72 S.Ct. 240, 96 L.Ed.2d 288 (1952).

As in United States v. United States Gypsum, 438 U.S. 422, 435, 446, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978), "...an essential element of a criminal...offense...cannot be taken from the trier of fact through reliance on a legal presumption..." and although the defendant's acts may well support an inference of malice "...the jury must remain free to consider additional evidence before accepting or rejecting the inference..."

The State has the unshifting burden of proving every element of an offense. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conclusive presumption conflicts with the presumption of innocence and invades the fact finding function. Sandstrom v. Montana, supra, 442 U.S. at 523, 99 S.Ct. at 2459. Such presumptions are also unconstitutional if they have the effect of shifting the burden of persuasion to the defendant.

In Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979) this Honorable Court invalidated a New York statute which provided that the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all occupants. Such a statute was unconstitutional because "...it tells the trier that he or they must find the elemental fact upon proof of the basic fact..." That is precisely what the Pennsylvania second degree murder statute does.


In Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) the jury was told that if the prosecution established that a killing was both intentional and unlawful, malice is imputed unless the defendant proved the contrary. Such a presumption was held to violate due process of law.

There is ample authority for appellant's appeal. The issue is substantial. It merits further review. It is respectfully submitted that it is not "manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument" as required by Rule 16. The State has not argued that the case does not present a substantial federal question.

CONCLUSION

For the reasons stated herein it is respectfully submitted that the Appellee's Motion to Dismiss or Affirm should be denied.

Respectfully submitted,



WILLIAM P. JAMES
Attorney for Appellant
Robert Santiago

IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA

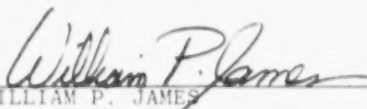
vs.

NO. 82-6950

ROBERT SANTIAGO,
Appellant

CERTIFICATE OF SERVICE

I, William P. James, Counsel for appellant, hereby certify that I have served a copy of this Answer to the Commonwealth's Motion to Dismiss or Affirm upon counsel for appellee, Eric B. Henson, Esquire, Deputy District Attorney, 1300 Chestnut Street, Philadelphia, Pa. 19102 by first class mail, postage prepaid, on August 16, 1983, which service satisfies the requirements of Rule 28 of the Rules of the Supreme Court of the United States. I certify that all parties required to be served have been served.


WILLIAM P. JAMES







